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No.

In The

Supreme Court of the United States

October Term, 1983

CHARLES H. SCHMIDT,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether trial delays caused by the trial court's cancellation and postponement of hearings on defense motions should be excluded in computing the time elapsed under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174.?

2. Whether a non-random method of selecting grand jurors that potentially discriminates against a cognizable subgroup is a substantial violation of the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1871, as a matter of law.

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the court of appeals below is reported at 711 F.2d 595 and is reprinted as Appendix A. The order of the court of appeals denying rehearing en banc is reprinted as Appendix B. The trial court entered an Opinion and Order in connection with the Speedy Trial issue and it is reprinted as Appendix C.

JURISDICTION

The decision of the court of appeals was entered on July 22, 1983. A timely suggestion for rehearing en banc was denied by order of September 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The operative provisions of the Speedy Trial Act, 18 U.S.C. §§ 3161 and 3162 are reproduced as Appendix D. Of

particular significance is 18 U.S.C. § 3161(h) (1) (F) which reads, in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time . . . within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to —
>
> ....
>
> (F) Delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, *or other prompt disposition of*, such motion;

(emphasis added)

2. The second question presented involves the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1871.

28 U.S.C. § 1861 provides:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries *selected at random from a fair cross section of the community in the district or division wherein the court convenes.* It is further the policy of the United States that *all citizens shall have the opportunity to be considered for service on grand and petit juries* in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. § 1867 provides in pertinent part:

> (a) In criminal cases, . . . the defendant may move to dismiss the indictment . . . on the ground of *substantial failure to comply with the provisions of this title in selecting the grand . . . jury.*

(emphasis added)

STATEMENT OF THE CASE

Petitioner Charles H. Schmidt was indicted on two counts of false swearing before a federal grand jury, 18 U.S.C. § 1623, on November 20, 1981. Shortly after his arraignment, Petitioner filed a number of pretrial motions including a motion to compel the United States District Clerk to allow Petitioner to review grand jury selection materials. A trial date was later scheduled for March 29, 1982 and a hearing on all pending motions was scheduled for March 3, 1982. At that time, the trial court granted Petitioner's motion to review grand jury selection materials and ordered that any motions in connection therewith be filed no later than March 15, 1982. Petitioner filed a motion to dismiss relating to irregularities in the grand jury selection process on March 15, 1982.

The original trial date was continued upon motion of Respondent over objections of Petitioner. Later, on April 24, 1982, the court entered a new order setting hearings on all pending motions for May 19, 1982, and trial for June 2, 1982. All briefing had been completed on the motions at that time and there was no further action to be taken other than such argument or hearing as the court desired and allowed. Prior to the May 10, 1982, hearings, however, the court vacated the trial setting and motions hearing. No order or other form of communication was entered to this effect but Defendant was merely notified by the court's docket clerk that the settings were being rescheduled due to other matters which needed to be taken up by the court. Finally, on August 27, 1982, the court entered a new order setting a date for motions hearing on September 24, 1982, and trial for October 18, 1982. Petitioner filed his motion to dismiss pursuant to the Speedy Trial Act on September 15, 1982, contending that more than 70 days had elapsed in

violation of the Act and the case should be dismissed. A summary of Petitioner's calculation of elapsed days is as follows:

Period	No. of Days	Days Excluded	Elapsed Days
Nov. 20, 1981-Dec. 9, 1981 Days properly excluded pursuant to 18 U.S.C. § 3161 (c) (1).	19	19	0
Dec. 9, 1981-Dec. 17, 1981 No motions pending or other basis for exclusion.	8	0	8
Dec. 17, 1981-Mar. 3, 1982 Entire period is treated as properly excluded due to filing and briefing of Defendant's motions in accordance with local rules through Feb. 2, 1982 and allowing one day for hearing and 30 days for deliberation of court. 18 U.S.C. § 3161 (h) (1) (F) and (J).	76	76	0
March 3, 1982-March 15, 1982 No motions pending, trial date set.	12	0	12
March 15, 1982-April 24, 1982 Defendant filed a motion to dismiss based upon grand jury selection. The Government then filed a motion for continuance based upon the unavailability of a witness. After the court granted the motion for continuance, Defendant filed additional motions. Thus all time could be excluded based upon filing, briefing and deliberation of Defendant's motions or the court ordered continuance.	40	40	0

Period	No. of Days	Days Excluded	Elapsed Days
April 24, 1982-May 10, 1982 All motions were fully briefed and ready for submission. The court had set a date for hearing and a trial date indicating the basis for continuance was ended.	16	0	16
May 10, 1982-Sept. 15, 1982 *No additional motions were filed and no new briefing was required as all motions had been set for submission by the court for May 10, 1982.*	128	0	128
Sept. 15, 1982-Oct. 8, 1982 Time excluded for briefing, hearing and deliberation of Defendant's motion to dismiss for failure to grant speedy trial.	23	23	0
Oct. 8, 1982-Oct. 18, 1982 No motions pending, trial date set.	10	0	10
TOTALS:	332	158	174

The trial court denied Defendant's Speedy Trial motion on the grounds that the time could be excluded due to pending defense motions and that it was in the "interest of justice" to delay the trial. The court of appeals affirmed on the ground that all time from May 10, 1982, to September 15, 1982, could be excluded because defense motions were pending.

The Grand Jury that returned the indictment in the instant case was selected from the Austin and Waco divisions of the United States District Court for the Western District

of Texas. The Local Court Rules authorizing this method of combining divisions for selection purposes required the District Clerk to pick names from the qualified juror wheels from each division to be served by the Grand Jury "on a substantially proportionate basis."

The undisputed evidence showed that the Austin division's voter registration list is approximately twice as large as the Waco division's. Nevertheless, the District Clerk in the instant case selected 30 names from each of the two divisions' qualified juror wheels. Had the Clerk selected these jurors at random from the pool available, twice as many Austin division residents as compared to Waco division residents should have been selected.

Both at trial and on appeal, Petitioner urged that the undisputed non-random selection procedure was a substantial violation of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1871 (the "Act"). Additionally, the method of selection potentially discriminated against a cognizable subgroup of prospective jurors in that approximately four times as many voters of Hispanic origin reside in the Austin division as in the Waco division, thus significantly reducing that subgroup's chances of being selected. In construing the purpose of the Act, however, the Fifth Circuit held that neither the Act nor the Local Court Rules had been substantially violated.[1]

[1]The Fifth Circuit apparently misunderstood Petitioner's argument in at least one critical respect. It stated that Petitioner only attacked the selection process as violating the local plan and did not claim a violation of the Act. Petitioner, however, has at every step claimed that the non-random selection methods utilized by the Clerk violate both the local plan and the Act.

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS CONSTRUED THE SPEEDY TRIAL ACT IN A MANNER INCONSISTENT WITH THE CONGRESSIONAL INTENT OF THE ACT, RAISING A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Speedy Trial Act generally mandates that a criminal trial commence within 70 days of arraignment of the defendant. 18 U.S.C. § 3161(c) (1). In determining whether the 70 days have elapsed, the Act excludes various delays, including "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on or other prompt disposition of such motion...." 18 U.S.C. §3161 (h) (1) (F). Notwithstanding the implied mandate that the exclusion applies only so long as the motions are *disposed of promptly*, the court below relied upon another recent case from the Fifth Circuit to affirm the trial court's holding. Opinion below at 601, App. A-11. In *United States v. Horton*, 705 F.2d 1414 (5th Cir. 1983), the Fifth Circuit had construed exclusion F as follows:

> The terms of exclusion F, quoted above, are all but absolute. They exclude "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing . . ." It is true that there follows a reference to "other prompt disposition" of the motion, one that might be taken to imply that such matters should be promptly disposed of and that might justify, in an egregious case, disregarding some portion of the pendency period. Such a case might be presented by repeated unsuccessful requests for hearings or by other credible indication that a hearing had been deliberately refused with intent to evade the sanctions of the Act. Nothing of the sort is evident here.

The question presented herein has wide significance as the aforesaid opinions tend to emasculate the protection afforded by the Speedy Trial Act for any defendant who files a pretrial motion. Under the *Horton* rule adopted by the court below, the trial courts may simply delay hearings on motions until a convenient trial date is reached and thereby avoid any time elapsing under the Speedy Trial Act. Additionally, as approved in the instant case, if the new trial date is not convenient, the trial court can then informally vacate the hearing setting and again avoid the Speedy Trial Act sanctions by a further postponement of a hearing.

It is clear that Congress intended the words "prompt disposition" to have meaning. In 1979, the Senate Judiciary Committee was considering amendments to the Speedy Trial Act. A Senate report was prepared setting forth the intentions with respect to certain amendments. S. Rep. No. 96-212, 96th Cong. 1st Ses. (1979). In discussing the relationship between subdivision (F) discussed herein and subdivision (J) relating to time excluded for deliberation, the report states at page 34:

> Finally, the section provides exclusion of time from filing to the conclusion of hearings on or "other prompt disposition" of any motion. This later language is intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing. In using the words "prompt disposition", the Committee intends to make it clear that, in excluding time betwen filing and disposition on the papers, the Committee does not intend to permit circumvention of the 30-days, "under advisement" provision contained in Subsection (h) (l) (J). Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be

> considerably less than 30 days. *Nor does the Committee intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary.* (emphasis added)

The last sentence of the above quoted portion makes clear that Congress did not intend the exclusion to become a loophole which would defeat the purposes of the Speedy Trial Act.

The effect of the holding by the panel in *Horton, supra,* as adopted by the panel in the instant case, is to give no meaning to the words "or other prompt disposition." Rather, the courts would adopt an indefinite standard whereby "promptness" would depend upon whether Defendant took some action to demand a hearing or demonstrated "... by other credible indication that a hearing had been deliberately refused with intent to evade the sanctions of the Act," *Horton, supra,* at 1416. We would be returned to the same type of subjective standards applied in Sixth Amendment cases which the Speedy Trial Act was designed to eliminate. In *United States v. Mehrmanesh,* 652 F.2d 766 (9th Cir. 1980) the court considered the purposes for the Speedy Trial Act and concluded that Congress intended to "... put teeth into the speedy trial guarantee." *Id.* at 769. In this connection, that court said:

> "The scheme operates like a statute of limitations. The guarantee is violated if the prosecution oversteps the time limits of the Act. Under the Speedy Trial Act *there is no need to measure prejudice to the Defendant.*" *Id.* at 769, (emphasis added).

Thus prejudice and intent measured in *Horton* should play no part in determining whether Defendant has been denied his rights under the Speedy Trial Act.

In the instant case, it is clear that the motions were fully briefed and ready for submission to the court except for such hearing as the court desired. The court had set the matter for hearing. Thus is was not necessary to delay the hearing for four months when nothing occurred during that time nor was anything requested. The informal cancellation and postponement of the hearing served no purpose other than to deprive Defendant of his rights under the Speedy Trial Act and allow the Government to bolster its case by using the Grand Jury and its plea bargaining power to develop new evidence.

If the hearing had been held on May 10, 1982, as scheduled, the opinions appear in agreement that the trial court would have been required to act on the motion and could have excluded only an additional 30 days for deliberation under § 3161(h)(1)(J). *United States v. Mers*, 701 F.2d 1321, 1336 (11th Cir. 1983).[9] Thus where a defendant has filed a motion and all briefing and other preliminary matters have been completed and the court has formally set the motion for hearing, a postponement of the hearing where no new matter is submitted should start the Speedy Trial clock running again. To hold otherwise thwarts the legislative intent and consistency of interpretation of the statute.

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[9]The trial court in the instant case ruled on Defendant's motion during the evidentiary hearing of September 24, 1982 clearly showing that the court had deliberated on the motion during the preceding four months.

II.

THERE ARE DEVELOPING CONFLICTS IN THE VARIOUS CIRCUITS IN THE TREATMENT OF EXCLUSIONS OF TIME FOR DEFENSE MOTIONS UNDER THE SPEEDY TRIAL ACT AND THIS COURT SHOULD SPEAK TO THE ISSUE TO INSURE UNIFORM TREATMENT.

The Fifth Circuit, as evidenced by the opinion below and its prior decision in *United States v. Horton*, 705 F.2d 1414 (5th Cir. 1983), takes the position that lengthy delays in holding hearings on defense motions need not be taken into account in determining elapsed time under the Speedy Trial Act. Conversely, the Second Circuit in *United States v. Cobb*, 697 F.2d 38 (2nd Cir. 1982) analyzed the legislative history previously cited and reached a contrary conclusion. In responding to a Government argument that excludable time did not terminate until the hearing on a defense motion regardless of when held, the court in *Cobb* said at 44:

> This argument ignores, however, Congress's intent in including the additional termination point of "other prompt disposition" of the motion. As noted above in the Senate Committee reports there was no intent that "additional time be made eligible for exclusion by postponing the hearing date [of a motion] beyond what is reasonably necessary."

The court in *Cobb* reasoned that where motions are not routinely disposed of but are carried until just before a trial setting, as in the instant case, that exclusion of the time "... would run directly contrary to the legislative scheme for obtaining speedy trials." *Id.* at 44. The same court ultimately interpreted the motions exclusion as follows:

> Thus, Congress's intent was to require trials within 70 days after excluding certain defined periods of delay. On a pretrial motion Congress intended to exclude under (F) only such time as was reasonably necessary for the fair processing of the motion. We conclude that the period of allowable excludable delay applicable to a pretrial motion begins automatically with the making of the motion and runs for a period of time that is "reasonably necessary" to conclude a hearing or to complete the submission of the matter to the court for decision. Under this view, long postponements of hearing dates, unless reasonably necessary, would not qualify as excludable time, nor would unnecessarily long extensions of time for the submission of papers. *Id.* at 44.

The Seventh Circuit made a similar analysis of the Act in *United States v. Raineri*, 670 F.2d 702, (7th Cir. 1982), which basically held that when the motions are ready for submission to the court, the only additional delay that may be excluded would be the number of days actually involved in hearings and the 30 days allowed for deliberation under 18 U.S.C. § 3161(h) (1) (J). *Id.* at 708.

In the instant case, the motions in question were fully briefed and ready for submission on April 24, 1982. Even excluding an additional 30 days for deliberation as suggested in *Raineri*, there would still have been more than twice the number of elapsed days as allowed by the Speedy Trial Act.

The effect of the holdings by the Fifth Circuit as adopted in the instant case, is to give no meaning to the words "or other prompt disposition" in exclusion (F). Thus there is an obvious conflict in principle between the treatment of this exclusion by the Circuits. The treatment given by the Seventh and Second Circuits would clearly have resulted in

a dismissal of the instant case. Certainly, it was not the intent of Congress that the standards vary from Circuit to Circuit or that Defendant be required to demonstrate prejudice or improper motive in order to prevail. Rather, the Act was to place the burden upon the prosecution and relieve the Defendant of the burden of proving prejudice. *United States v. Mehrmanesh*, 652 F.2d 766, 769 (9th Cir. 1980).

If the holding in the instant case is sanctioned, the integrity of the Speedy Trial Act will be destroyed. In the instant case, the trial court routinely carried defense motions until a trial setting was made at which time a hearing on motions was set shortly prior to the trial setting. When the court determined to postpone the trial setting, the court likewise postponed the hearings scheduled. Even if the court did need additional time to consider the motions, neither the trial court nor the Court of Appeals below explains the reason the court waited until it had made a new trial setting before making a new setting on the motions. Rather, it is obvious that the motion settings were in relation to a trial setting rather than in response to the motions themselves.

In addition to violating the terms and spirit of the Speedy Trial Act, this procedure works extreme prejudice on a defendant by delaying decisions on motions until shortly before a trial date. Furthermore, it forces a defendant to elect between seeking relief by motions or giving up his right to a Speedy Trial under the Act.

III.

THE WRIT SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT AND OTHER CIRCUITS HAVE SO CONSTRUED THE JURY SELECTION AND SERVICE ACT'S RANDOM SELECTION REQUIREMENT AS TO IGNORE SUBSTANTIAL VIOLATIONS THEREOF — A RESULT NEITHER INTENDED BY CONGRESS NOR CONSISTENT WITH THE PURPOSE OF THE ACT.

The question presented is the familiar and troublesome one of statutory construction. Since its passage in 1968, the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1871 (the "Act"), has scarely been cited for a reversal of a criminal conviction based on the defendant's assertion that the Act had been substantially violated.[3] The facts presented in this case demonstrate that it has not been for want of substantial violations but rather for want of plausible interpretation that the Act has been so mildly enforced. If the Act is to have any meaning apart from the Sixth Amendment's guarantee of an impartial jury, the Court should now speak for the first time on whether the Petitioner in this case had shown a "substantial failure to comply" with the Act's requirement that the Grand Jury that indicted him be "selected at random from a fair cross section of the community...."

> The Act's purpose
>
> is to assure all litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified citizens will have the opportunity to be considered for jury service.

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[3] In one case, a violation of the Act's underlying principles may have contributed to a reversal. *United States v. Fernandez*, 480 F.2d 726 (2nd Cir. 1973).

1968 U.S. CODE CONG. & ADMIN. NEWS p. 1792 (the "Legislative History"). Voter lists were expressly approved as a pool from which the random selection could be made, thus guaranteeing that

> any one whose name appears on the voter lists *has a chance of being selected equal to that of any other listed person....*

Id. at 1793 (emphasis added).

Congress clearly intended to establish a mechanical procedure easily followed by those charged with the duty of constructing an array of potential jurors, so as to "virtually eliminate the possibility of impermissible discrimination and arbitrariness" associated with the key man system of selection.[4]

In doing so, Congress was well aware that it was the integrity of the selection process — not the make-up of any particular jury impaneled — that guaranteed the end sought:

> If the voter lists are used and supplemented where necessary, and if the procedures outlined in the bill are otherwise rigorously followed it is no departure from the standards of the legislation that the qualified jury wheel, the venire or array, or the jury itself, may not reflect a community cross section. The act guarantees only that the jury shall be "selected at random from a fair cross section of the community." It does not require that at any stage beyond the initial source list the selection process shall produce groups that accurately mirror community makeup. Thus, no challenge lies on that basis.

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[4]The Legislative History recounts that the key man system not only resulted in racial discrimination but "[o]ften . . . result[ed] in under-representation of craftsmen, service workers, and laborers as compared with the professional and managerial classes." *Id.* at 1794, n.1.

> In short, the act attempts to achieve its cross sectional aim by insuring that the basic source list is adequate in that regard and that *no procedure is employed that would impermissibly diminish the likelihood that a cross section will be attained.*
>
> • • •
>
> [P]*rocedural regularity is the measure of the validity of the selection system.* It is an appropriate measure since the bill sets up a largely mechanical process in which the role of human discretion is minimized. The bill does not guarantee that each venire or each jury will mirror the structure of the community. It guarantees only that appropriate selection procedures have been used.

Id. at 1794, 1805 (emphasis added).

Finally, and leading to the question presented, the Act declares as unlawful a "substantial" failure to comply with its terms:

> [C]hallenges will lie only for substantial failure to comply with the statutory provisions. There is room for a doctrine of harmless error. For example, if the local plan should call for 2,000 names to be placed initially in the master wheel and only 1,990 names are used, the reviewing court could find such a departure harmless. The combination of specificity and the substantial failure to comply feature will mean that judges will have readily available standards against which they can measure the procedures actually used.

Id. at 1805.

Unfortunately, as this case shows, many lower courts have adopted inconsistent "standards against which they can measure the procedures actually used." In the Fifth Circuit, for instance, two fundamentally different standards pres-

ently exist. On the one hand, the court in *United States v. Kennedy*, 548 F.2d 608 (5th Cir.), *cert. denied*, 434 U.S. 865 (1977), concluded that any violation which affected the random nature of selection not only violated the Act but must be considered substantial and would warrant dismissal of an indictment:

> A litigant need not show prejudice to establish a "substantial failure to comply" with the Act. Congress deleted just such a requirement from the bill presented to the conference committee. . . . Congress did not simply outlaw certain disparities in representation of certain groups on juries; it designed a procedure of random selection to insure that no such disparities would arise. *A departure from the statutory scheme that directly affects the random nature of selection establishes a substantial violation independently of the departure's consequences in a particular case.*

548 F.2d at 612 (emphasis added).

On the other hand, the court in *United States v. Bearden*, 659 F.2d 590 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982), concluded that a proven departure from randomness was not enough:

> The underlying concern ... is that the methods used *must not result or have the potential to result in discrimination* among cognizable groups of prospective jurors. While the methods used here by the jury clerk were "statistically non-random," there is no showing they either allowed discriminatory selection of jurors or otherwise prevented jury panels from consisting of fair cross sections of the community."[5]

569 F.2d at 602 (emphasis added).

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[5] As noted above, the non-random method of selection used in the instant case potentially discriminated against Hispanics. That group populates the Austin division far more densely than the Waco division. Thus, when the method of selection discriminated against those in the Austin division, it necessarily discriminated against those members of the pool of Hispanic origin.

In fact, the Fifth Circuit has engrafted on the Act an additional requirement, presenting an almost insurmountable barrier to a finding of substantial violation. This requirement looks to the actual numerical effect of a departure from random selection on the impaneled jury. *See, e.g., United States v. Hawkins*, 661 F.2d 436 (5th Cir.) *(en banc), cert. denied*, 456 U.S. 991 (1982) (underrepresentation on panel of 23 grand jurors by approximately 2 jurors from one division and overrepresentation by approximately 1.5 jurors from another division held insubstantial). Such an analysis, however, flouts the intent of Congress, which rejected considerations of the make-up of any particular jury panel in favor of a "technique of random selection tend[ing] to insure, according to the laws of probability, that distortions most often will be minor and will even out in the long run." Legislative History, *supra*, at 1798.

It is clear that the standards articulated in *Hawkins, supra*, stem from a line of cases erroneously adopting the Court's more rigorous constitutional standards concerning jury selection. *Hawkins* cites the Court's decision in *Duren v. Missouri*, 439 U.S. 357 (1979), which declared the jury selection procedures in the State of Missouri in violation of the Sixth Amendment's fair-cross-section requirement as they related to the selection of female jurors. The *Duren* Court's Sixth Amendment analysis[6] is, of course, funda-

[6]Relying on its decision in *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court held in *Duren*:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

439 U.S. at 364.

mentally different from the random selection analysis dictated by the Act. Indeed, if the Act is to have any meaning independent of the Sixth Amendment, a *Duren* analysis presupposes compliance with the Act or with a state's functional equivalent of the Act.

Other Courts of Appeals have also erroneously adopted *Duren* as the basis for their interpretation of the Act. *See, e.g., United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981), (citing *Duren* and stating, "These standards are functionally equivalent to those used to enforce 28 U.S.C. § 1861."); *United States v. Foxworth*, 559 F.2d 1, 3-4 (1st Cir. 1979) (citing *Duren* and *Taylor, supra*, in determining whether substantial failure to comply with the Act had occurred); *United States v. Test*, 550 F.2d 577, 584-86 (10th Cir. 1976) (citing *Taylor* and other Sixth Amendment decisions in interpreting the Act).

Compounding the confusion, *Hawkins, supra*, which purportedly focused on departure from random selection procedures, relied on a line of Fifth Circuit decisions[7] addressing an entirely different question, one not at issue here; namely, whether the pool from which jurors were selected constituted a fair cross-section of the community.[8] As Congress explicitly left to judicial decision whether voter registration lists

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[7]*Hawkins* relied on *United States v. Maskeny*, 609 F.2d 183 (5th Cir.), *cert. denied*, 447 U.S. 921 (1980), which, in turn, relied on *United States v. Goff*, 509 F.2d 825 (5th Cir.), *cert. denied*, 423 U.S. 857 (1975).

[8]The Fifth Circuit's parenthetical observation that Petitioner in the instant case could have been indicted by a jury comprised entirely of Waco residents misses the point. Under the scheme provided in the Act, once a pool is selected, a random selection technique giving each member of the pool an equal opportunity of being chosen must be employed. Petitioner does not complain of the pool from which the jury was chosen but the non-random method of selection from the pool.

required supplementation so as to satisfy the cross-section requirement, Legislative History, *supra*, at 1794, it may well be appropriate to analyze the impact on a particular jury of alleged underrepresentation of cognizable groups from which random selection is conducted. It is wholly inappropriate, however, and completely inconsistent with the concept of random selection, to analyze the intregrity of randomness in terms of the number of seats on a jury affected, or, indeed, in terms of whether any cognizable group is affected at all.

The Act is simple and direct in its command. Random selection is required no matter from what particular pool. As stated in *Kennedy*, *supra*,

> A departure from the statutory scheme that directly affects the random nature of selection establishes a substantial violation independently of the departure's consequences in a particular case.

Contrary and erroneous analyses found in both the Fifth Circuit and other Courts of Appeals not only eviscerate the Act but, in looking to the impact on the number of seats in a particular panel, would sanction as not a substantial violation of the Act any non-random process culling from the available pool a minority small enough not to warrant more than a fraction of a seat.

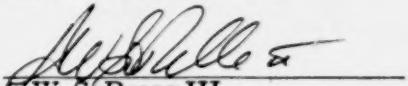
Fundamental principles of randomness require that each member of the available pool be given an equal opportunity of selection. M. Hansen, W. Hurwitz, W. Madow, *Sample Survey Methods and Theory*, Vol. 2, Ch. 1 (J. Wiley & Sons, Inc. 1956); S. Wilks, *Mathematical Statistics*, "Sampling from a Finite Population," Ch. IV, Sec. 4.3 (Princeton University Press 1943). Those principles provide the foundation underlying the Act. Thus, as it must be conceded that (1) a non-random process was used in selecting the Grand

Jury that indicted Petitioner, and (2) the Federal courts require guidance from the Court as to the meaning of "substantial failure to comply with the provisions of [the Act]," the writ of certiorari should be granted.

CONCLUSION

The need for uniform application of the Speedy Trial Act and the Jury Selection and Service Act is significant as all criminal defendants are affected by them. A writ of certiorari should therefore be granted in order to insure uniform and proper application of these statutes consistent with the original intent of Congress.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that, on the 12th day of October, 1983, three copies of the foregoing Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Respondent by placing same in the United States mail, certified mail, postage prepaid, addressed to Respondent's attorneys of record as follows:

Ms. Margaret G. Halpern
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A. W. SoRelle III

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles H. SCHMIDT,
Defendant-Appellant.

No. 83-1090.

United States Court of Appeals,
Fifth Circuit.

July 22, 1983.

Appeal from the United States District Court for the Western District of Texas.

Before GARZA, POLITZ and TATE, Circuit Judges.

GARZA, Circuit Judge:

Defendant-appellant, Charles Schmidt, appeals from his conviction after a jury trial on one count of making false statements before a grand jury in violation of 18 U.S.C. § 1623. Schmidt raises numerous grounds for error including challenges to the indictment, to the grand jury selection and to the lower court's refusal to admit expert testimony. He also raises a speedy trial claim. Finding no reversible error, we affirm.

Charles Schmidt is part owner of a highway paving construction firm located in Amarillo, Texas. As part of a series of investigations by the Department of Justice into illegal "bidrigging" for government contracts, Schmidt was called to testify before a federal grand jury sitting in Austin, Texas on January 22, 1981. He began testifying at 11:15 a.m. and was dismissed late in the day at the end of proceedings for that day. During his examination, Schmidt was asked questions generally about his work and his method for calculating bids for government contracts. He was then asked about several specific projects and asked to explain various "coincidences" in bidding which government attor-

neys suggested were reflected by comparison of bids submitted and projects awarded when certain combinations of firms were involved in submitting bids. Finally, Schmidt was asked to answer a series of questions all of which sought to determine if Schmidt knew of or had ever been involved in illegal bidrigging. Schmidt exercised no fifth amendment privilege, but rather chose to answer each of the questions in the negative. Other than lunch recess and several breaks, Schmidt never requested permission nor took the opportunity to speak with his retained counsel who was present outside the grand jury room. Based on his answers to this last series of questions, Schmidt was indicted and subsequently convicted for false swearing.

Sufficiency of the Indictment and Evidence

Schmidt first raises several challenges to the indictment itself. He contends that the indictment was deficient because it failed to allege an offense or advise him of the charges being made. His contention rests upon the language in two paragraphs (¶¶5 and 6) of Count 1 of the indictment under which Schmidt was brought to trial.

Paragraph 5 sets forth the supposedly false statements he made before the grand jury:

Q. Has any contractor or representative of a contracting firm ever asked you or someone else from your company to submit a cover or complementary bid as you have defined it?

A. Not—not that I remember. Not that I remember.

Q. Has any other general contractor or representative of another general contractor asked you or another member of the company if they could have a particular job?

A. No.

Q. Has any contractor or employee of a contracting firm ever given you or a representative of your company a

dollar figure or markup figure and asked you to submit a bid higher than that figure?

A. Not that I know of.

Q. Have you or anyone else in your company ever offered to—or been requested to exchange a cover bid or a complementary bid or promised not to bid on a particular project?

A. No.

Paragraph 6 explains why these statments are false stating that Schmidt's declarations "were untrue and false in that he was aware that he had agreed with at least one other Texas highway contractor to refrain from bidding competitively on a Texas highway project and agreed to turn in a complementary bid on the project on behalf of the other contractor."

Schmidt asserts that the "truth" allegations in paragraph 6, which refer to whether he was "aware of" or had "agreed to" make complementary bids, do not directly contradict or put into issue the alleged false statements in paragraph 5, which refer to whether he "or anyone else in his company" had been "asked," "requested," or "promised" to make these bids. We disagree.

Looking at the indictment as a whole and heeding "practical, not technical considerations," *United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977), this indictment is sufficient because it contains the elements of the offense charged and fairly informs the defendant of the charge against him. *Hamling v. United States*, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974). Even a cursory reading of the indictment establishes what statements the government alleged to be false and why such was in fact the case. It is obvious that if the facts alleged in paragraph 6 were true, then Schmidt's statements in paragraph 5 were false. If in fact Schmidt "had agreed to" submit a complementary bid as alleged in paragraph 6, then

such presupposes that he was in fact "asked" or "requested" to submit the bid which he had denied in paragraph 5.

Furthermore, contrary to Schmidt's assertion, the evidence clearly established the "truth" allegations of paragraph 6. At trial, the government introduced evidence from four contractors indicating that Schmidt had actively participated in bidrigging by submitting complementary bids in a substantial number of cases. Such evidence established that Schmidt materially lied in his grand jury testimony denying both his knowledge and participation in and his recall of bidrigging activities. We must reject, therefore, appellant's challenges to the indictment and sufficiency of evidence.

Expert Testimony

Schmidt's second contention raises a more serious concern. Appellant challenges the exclusion by the trial court of testimony by a linguistics expert which appellant claims was vital to the presentation of his theory of defense. At trial, Schmidt attempted to establish that whatever falsehoods he may have stated before the grand jury were not knowingly and willfully uttered. The defense sought to establish that after five and one-half hours of otherwise truthful testimony which in part detailed facts about specific transactions, Schmidt's uncertain responses (such as "not that I remember") to various global questions by the government were not intentional and knowing falsehoods, if at all.

For reasons not relevant to our consideration of this issue, Schmidt chose not to testify himself at trial. Instead, the defense sought to introduce the expert testimony of psycholinguistics professor, William Peters, for the purpose of placing into context the alleged falsehoods uttered by Schmidt. In a proffer of testimony outside the jury's presence, Peters explained how certain answers to certain questions, which on their face might appear to be false, could in fact be interpreted otherwise when placed in the

total context of a discussion.[1] He also explained that the length of Schmidt's testimony, the stress he was under and the global nature of the questions asked by the government could have affected the manner in which Schmidt interpreted the questions and responded to them.

After careful deliberation, the district court denied appellant's proffer of expert testimony finding that the evidence would "not assist the trier of facts to better understand the evidence or to determine any fact in issue." The court found that the issue presented was not complex and that the jury was more than capable of examining and considering the context in which the defendant had testified. More importantly, the court found that the admission of the proffered testimony would tend only "to confuse the issues and would tend to mislead, rather than assist, the finder of facts." We must determine if the court abused its discretion.

Fed.R.Evid. 702 states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . *may* testify thereto in the form of an opinion or otherwise." (emphasis added). It is the duty of the trial court, however, to determine

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[1]Professor Peters gave the following example:

> "How one interprets questions — a given question can certainly be influential by what has happened before, yes .... [S]uppose that you and I had been talking about a trip that I took last weekend, say to see a football game somewhere. And then, you were to ask me, "Well, what have you been doing lately?" It would be perfectly natural for me to think you were asking about things other than this trip to see the football game and very odd, since the answer would be perfectly obvious for me to interpret the question, let's say literally."

The defense sought to raise the inference that Schmidt, because he had previously discussed in greater detail various transactions with certain contractors, may have inferred from the government's general questions that they sought information about bidrigging among contractors other than those previously discussed before the grand jury.

whether under the facts of a particular case the proffered testimony will aid the jury in its deliberation. The court has wide discretion to admit or exclude expert testimony and such action will be sustained unless manifestly erroneous. *Salem v. United States*, 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); *Page v. Barko Hydraulics*, 673 F.2d 134, 139 (5th Cir. 1982); *United States v. Lopez*, 543 F.2d 1156, 1158 (5th Cir. 1976), *cert. denied*, 429 U.S. 1111, 97 S.Ct. 1150, 51 L.Ed.2d 566 (1977); 3 Weinstein's Evidence § 702[02]. Although Rule 702 "somewhat broadens the range of admissibility, it by no means mandates admission of such testimony." *United States v. Lopez, supra.* Expert testimony, like any other testimony, may be excluded if, compared to its probative worth, it would create a substantial danger of undue prejudice or confusion. Fed.R.Evid. 403. In reviewing the lower court's exercise of discretion we are mindful that an appellate court, unlike the court below "does not have the benefit of the first hand observation of the witnesses and testimony as it unfolds before the jury," *Meineke Discount Muffler Shops, Inc. v. Bleier*, ——F.2d—— (5th Cir. June 23, 1983); accordingly, only in exceptional circumstances will reversible error be found in the district court's determination of the probative value of testimony in a particular case. *Offshore, Inc. v. K.O. Steel Castings, Inc.* 662 F.2d 1104, 1107 (5th Cir. 1981).

We do not believe the district court abused its discretion. The admissibility of the expert testimony in this case was a close question. Professor Peters' testimony, while arguably relevant and admittedly important to defendant's case, was also of a nature which complicated an otherwise simple issue before the jury.[2] The trial judge, who heard the testimony, was in the best position to determine the effect of such testi-

[2]Professor Peters identified himself as a "cognitive scientist" specializing in "psycholinguistics." Much of his testimony dealt, with the manner in which memory was stored in the brain and the ability of one to recall information. After analyzing the grand jury transcript, he sought to point out what questions in his opinion possessed "high-probe value" and which ones did not.

mony on the jury and whether it would tend to assist or confuse the triers of fact in their deliberations. The lower court carefully considered the question, hearing arguments from both parties and granting counsel time to make a substantial proffer of testimony. The court then recessed the trial for a short period to consider further the admissibility of the testimony. It ultimately concluded such testimony would not assist the jury. We find no abuse of discretion in the court's ruling. *See United States v. West*, 670 F.2d 675, 682 (7th Cir.), *cert. denied* ——U.S.——, 102 S.Ct. 2972, 73 L.Ed.2d 1359 (1982) (no error in denying expert testimony as to defendant's ability to understand a bribe); *Chesebrough-Pond's, Inc. v. Faberge, Inc.*, 666 F.2d 393, 397-98 (9th Cir. 1982), cert. denied ——U.S.——, 103 S.Ct. 294, 74 L.Ed.2d 277 (1982) (exclusion of expert testimony as to similarity of words permissible; *United States v. Hearst*, 563 F.2d 1331, 1349-50 (9th Cir. 1977); *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978) (exclusion of psycholinguistics expert for Rule 403 relevance reasons was not error). Furthermore, even considering the proffered testimony, assuming maximum probative force and minimum prejudice, *see Offshore, Inc. v. K.O. Steel Castings, Inc., supra*, 662 F.2d at 1107-08, the evidence presented was so inculpatory that we do not believe a different result would have been reached had the expert testimony been before the jury.

Grand Jury Selection

We find little merit to appellant's next claim — that the grand jury which indicted him was not selected in accordance with the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et. seq.* and the local plan in the Western District of Texas providing for random selection of grand jurors. In the instant case, the grand jury was selected in equal proportions from two divisions in the western district, the Austin and Waco divisions. The local plan itself provided that when jurors were selected from more than one division, they were to be chosen "on a substantially proportionate basis." Had jurors been chosen from each division on an *exact* proportionate basis, thirty-nine, rather than thirty,

would have been chosen from the Austin division. This slight variance, if at all, from the local plan, it is asserted, required the court to dismiss the indictment. We disagree.

The Jury Selection and Service Act provides for the dismissal of an indictment only when there has been a *substantial* failure to comply with the statutory provisions in selecting the grand or petit jury. 28 U.S.C. § 1867(a). Whether there has been a substantial violation of the Act is determined by weighing the alleged violation against the underlying principles of the Act. *United States v. Bearden*, 659 F.2d 590, 600 (5th Cir.1981), *cert. denied*, 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982); *United States v. Maskeny*, 609 F.2d 183, 191 (5th Cir.), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980); *United States v. Davis*, 546 F.2d 583, 589 (5th Cir.), *cert. denied*, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977). This court, citing to legislative history, has recognized that the two fundamental principles of the Act are: (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror disqualifications, excuses, exemptions and exclusions on the basis of objective criteria only. *United States v. Bearden*, *supra*, 659 F.2d at 600. Mere technical deviations from the Act constitute neither a substantial noncompliance nor frustration of the principles of the Act. *Id.*, 659 F.2d at 601; *United States v. Davis*, *supra*, 546 F.2d at 589. Violation of a local plan is analyzed in the same manner as the Act; we look to see if any of the Act's policies were frustrated therefrom. *United States v. Bearden*, *supra*, 659 F.2d at 601.

Appellant does not and cannot cite to any violation of the Act itself which occurred in this case; rather, his sole claim rests upon the asserted violation of the local plan with respect to the proportionate selection of jurors from differing divisions. Assuming arguendo that any noncompliance occurred, such is at best harmless error. There can be no doubt that the random selection of jurors which the Act seeks to enforce was not violated in this case. The local plan itself, at that time, required that jurors be selected "on a

substantially proportionate basis," not an *exact* proportion as Schmidt claims. In fact, the district court found that the selection process used did not even violate the local plan "since a reasonable interpretation of the local plan indicates the acceptability of choosing approximately an equal number of prospective jurors from each division in the random draw." It is somewhat ironic that before Schmidt ever filed his motion to dismiss on March 15, 1982, the local plan had been amended abolishing multi-division grand juries; thus, had his indictment been dismissed, Schmidt could have been reindicted by a grand jury drawn entirely from Waco, the division he presently claims was overrepresented. In this light, it is difficult to perceive how the absence of exact proportional representation between divisions constituted a substantial violation of the Act's policies. It is even more ironic that the grand jury which in fact indicted Schmidt was composed of roughly a 2-to-1 proportion of individuals from Austin and Waco, respectively.

This court in *Bearden*, held that the Act does not require "statistical randomness" 659 F.2d at 601-02; the clerk's erroneous selection of starting numbers for choosing the jury from a wheel of names, that may have resulted in a non-random concentration of jurors from certain segments of the wheel, did not constitute a substantial violation of the policies behind the Act to warrant dismissal of the indictment. The *Bearden* court quoted the legislative history of the Act, that approves "some system of selection that affords no room for impermissible discrimination against individuals or groups." S.Rep. No. 891, 90th Cong., 1st Sess. 16 n. 9 (1967). The clerk's mistake in the present case is analogous to that presented in *Bearden*. We find no substantial error which would have required dismissal of the indictment.

Speedy Trial Claim

Schmidt next contends that his right to speedy trial was breached by the failure of the district court to promptly dispose of various motions which allegedly were under consideration thereby delaying his trial beyond the seventy-day

limit provided by the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* Schmidt was indicted on November 20, 1981 and arraigned nineteen days later on December 9, 1981. His trial commenced October 18, 1982. The time elapsing between his indictment and trial date amounted to 322 days; of this amount, Schmidt concedes that 158 days were properly excludable. The critical 128-day period which he challenges as non-excludable occurred between May 10, 1982 and September 15, 1982 during which Schmidt claims the district court failed to promptly dispose of pending motions. We find that such time period was properly excludable and that no speedy trial violation arose.

On March 15, 1982, Schmidt filed a motion to dismiss the indictment on grounds challenging the selection of the grand jury. An extensive brief and numerous exhibits accompanied what at the time was a substantial motion. Shortly thereafter, a continuance was granted the government for other reasons and various other motions were filed by the defendant. The filing of defendant's motion to dismiss also, in the district court's words, "evoked a flurry of corresponding assaults on this District's grand jury selection process" by other defendants in these related state highway contract cases. On April 24, the court ordered that pretrial motions be set for hearing on May 10 and that trial commence June 2, 1982. The court ultimately concluded that the effect of invalidating the grand jury process in Schmidt's case would have a substantial precedential impact on other defendants indicted by Schmidt's grand jury as well as by other grand juries in the district. For these reasons, the court concluded that Schmidt's grand jury motion "demanded something more than perfunctory judicial review." Accordingly, the court rescheduled hearings on the motion to allow for an evidentiary hearing (requested by defense counsel), for oral argument, and for time to consider further the issue presented. A hearing was thereafter set for September 24, 1982 where Schmidt's counsel, on behalf of all the highway contractor defendants, presented extensive testimony and documentary evidence. On September 15, Schmidt

filed his speedy trial motion. The court subsequently ruled that all delay was excludable it was the result of a pretrial motion excludable under § 316(h) (1) (F), or was subject to the "ends of justice" provision of § 316(h) (8) (A).

Section § 316(h) (1) (F) provides that any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion" is excludable in computing the time within which a trial must commence. Schmidt contends that the words "other prompt disposition" imply that the exclusion is lost when a hearing is not held "promptly." He urges that any delay over 30 days is not reasonable, because the legislative history to § 3161(h) (1) (F) and § 3161(h) (1) (J) (which provides that any period of delay exceeding 30 days "during which any proceeding concerning the defendant is actually under advisement by the court" is not excludable) require such a limitation.

Schmidt's argument, however, is foreclosed by this court's recent decision in *United States v. Horton*, 705 F.2d 1414 (5th Cir.1983). In *Horton*, a similar construction of exclusion F was rejected by this court stating:

> The terms of exclusion F, quoted above, are all but absolute. They exclude "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing...." It is true that there follows a reference to "other prompt disposition" of the motion, one that might be taken to imply that such matters should be promptly disposed of and that might justify, in an egregious case, disregarding some portion of the pendency period. Such a case might be presented by repeated unsuccessful requests for hearings or by other credible indication that a hearing had been deliberately refused with intend to evade the sanctions of the Act. Nothing of the sort is evident here.

Id. at 1416. In *Horton*, the court found no unreasonable delay in the 213 day motion pendency involved. Likewise, as in *Horton*, no egregious case is presented by the present facts

which reveal no repeated unsuccessful attempts on the part of defense counsel to schedule the hearings or, other facts suggesting an intent to evade the sanctions of the Act. Faced with what the court perceived to be a complex and potentially far-reaching decision, the court postponed the original hearing to develop more fully the substance of the claim presented to it. The "conclusion of the hearing" not coming until September 24 (after defendant's September 15 motion had again tolled the seventy-day time period), the court properly concluded that the 128-day period was all properly excludable under exclusion F. To again quote our brethern in *Horton:*

> As Congress doubtless recognized in enacting exclusion F, today's motion practice in criminal cases can be, and often is, both complex and dispositive. That exclusion places no rigid time structures on the practice whatever, and only the shadow of an implied one. Fidelity to its enactment requires rejection of appellants' contention.

Id. at 1416 (footnote omitted).

Remaining Claims

Schmidt has raised an assortment of other less significant claims for our consideration on appeal.[3] Suffice it to say that we have considered each of them in light of the facts before us and the applicable law, and we conclude that they do not present meritorious claims. The judgment of the district court, therefore, is AFFIRMED.

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[3]Schmidt also raises challenges to: (1) portions of the jury instructions; (2) the lower court's denial of a motion to strike certain language from the indictment; (3) the prosecutor's closing argument; and (4) the prosecutor's questioning of certain witnesses.

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1090

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES H. SCHMIDT,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 22, 5 Cir., 1983, ——F.2d——)

(September 9, 1983)

Before GARZA, POLITZ and TATE, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX C

In The
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA

vs.

CHARLES H. SCHMIDT

CRIMINAL NO. A-81-CR-126

MEMORANDUM OPINION AND ORDER

Now the Court has before it for consideration in the above-styled and numbered cause the Motion of Defendant CHARLES H. SCHMIDT to Dismiss for Failure to Grant a Speedy Trial. SCHMIDT premises his Motion on the Court's alleged failure to commence his trial within the time limits prescribed in the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*, and as additionally mandated by the Sixth Amendment to the United States Constitution. Having carefully considered said Motion, the Government's Response, and the briefs and arguments of counsel, the Court, in accordance with its October 8, 1982 Order, is of the opinion that the instant Motion should be denied. Therefore, in conjunction with the October 8, 1982 Order denying Defendant SCHMIDT'S Motion to Dismiss, the Court enters the following Memorandum Opinion and Order.

I. PERTINENT CHRONOLOGY

November 20, 1981 —

Defendant SCHMIDT was charged in a two count indictment with violations of 18 U.S.C. § 1623 concerning his allegedly false material declarations stated to a federal grand jury relating to his knowledge and par-

ticipation in practices by Texas highway construction contractors that were contrary to the provisions of the Sherman Act, 15 U.S.C. § 1, *et seq.*

December 9, 1981 —

Defendant, waiving personal appearance, was arraigned and entered a plea of not guilty.

December 17, 1981 —

Defendant filed his initial pretrial motion, wherein he requested an extension of time to file pretrial motions.

December 21, 1981 —

The Court entered an Order granting Defendant's motions filing deadline until January 15, 1982. The Court incorporated in this Order an express finding that the "ends of justice served by granting said Motion... outweigh the best interests of the public and the Defendant in a speedy trial."

January 15, 1982 —

Defendant files a subsequent Motion for additional time within which to file pretrial motions.

January 28, 1982 —

The Court entered an Order granting Defendant's second Motion for additional time to file pretrial motions and enlarged SCHMIDT's filing period through February 15, 1982. A similar "ends of justice" finding was also embodied in this January 28, 1982 Order.

Prior to February 15, 1982, SCHMIDT filed a number of pretrial motions, including a Motion to Obtain Grand Jury Selection Materials. The Government filed responses to these defense motions, and after cursorily examining the motions and responses, the Court determined that the issues raised therein required oral argument for proper resolution. Accordingly, the Court scheduled these motions for hearing on March 3, 1982.

March 3, 1982 —

Following oral argument on all pending motions, the Court announced its rulings thereon and pursuant to Defendant's Motion to Obtain Grand Jury Selection Materials entered a written Order that granted SCHMIDT's counsel access to the requested records. The Order further specified that any prospective SCHMIDT motion that challenged the grand jury selection process had to be filed by March 15, 1982.

March 15, 1982 —

SCHMIDT filed a Motion to Dismiss predicated on constitutionally and statutorily impermissible procedures used to select the grand jury that indicted him. (hereinafter referred to as SCHMIDT'S Grand Jury Motion). Also on March 15, 1982, the Government filed a Motion for Continuance of the scheduled March 29, 1982 trial date based on the unavailability of an essential Government witness.

March 24, 1982 —

The Court granted the Government's Motion for Continuance.

March 15, 1982 —

March 29, 1982 —

SCHMIDT, coupled with his Grand Jury Motion, filed four additional pretrial motions including one styled, "Motion to Require Disclosure of In Camera Evidence Presented at Hearing on Discovery and Inspection; Motion to Reopen Hearing on Motion for Discovery and Inspection; and Motion for Order to Preclude Government from Using Ex Parte Method of Presenting Evidence Unknown to Defendant." SCHMIDT also filed during this period a renewed Motion for Bill of Particulars, a Motion to Reconsider all Prior Pretrial Motions addressed at the March 3, 1982 hearing and a Motion to file Additional Pretrial Motions.

April 24, 1982 —

An Order setting schedule was furnished to counsel wherein the pending pretrial motions were set for hearing on May 10, 1982, and trial slated to commence on June 2, 1982.

Prior to May 10, 1982, all counsel were advised by the Court that the May 10, 1982 Motions hearing had been continued and substantially before June 2, 1982, the attorneys were also informed that the June trial setting had been continued. On August 27, 1982, notice was mailed to all counsel herein advising them that the pretrial motions hearing would be scheduled for September 24, 1982.

September 15, 1982 —

Defendant SCHMIDT filed the instant Motion to Dismiss for Failure to Grant a Speedy Trial.

September 16, 1982 —

Defendant SCHMIDT filed two additional pretrial motions.

September 24, 1982 —

The Court conducted a hearing, wherein it entertained the introduction of evidence, including witness' testimony, as well as oral arguments, with regard to Defendant's pending motions. At this hearing, the Court announced its rulings on all motions with the exception of SCHMIDT's Motion to Dismiss for Failure to Grant a Speedy Trial, which was taken under advisement.

October 8, 1982 —

The Court entered an Order denying Defendant's Motion to Dismiss for Failure to Grant a Speedy Trial.

October 18, 1982 —

The trial of this cause commenced.

II. SPEEDY TRIAL ACT, 18 U.S.C. § 3161, *et seq.*

Provisions of the Speedy Trial Act relevant to the Court's present inquiry include the following:

18 U.S.C. § 3161 (c) (1) —

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

18 U.S.C. § 3161 (h) (1) (F) —

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> > (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to —
> >
> > (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

18 U.S.C. § 3161 (h) (1) (J) —

> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

18 U.S.C. § 3161 (h) (3) (A) —

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

18 U.S.C. § 3161 (h) (8) (A) —

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161 (h) (8) (B) (i) —

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

18 U.S.C. § 3161 (h) (8) (B) (ii) —

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of

> fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

In the case at bar, except for the period during December 10, 1981 through December 16, 1981, one or more of the Speedy Trial Act's excludable provisions were triggered and continually in effect between November 20, 1981, and June 2, 1982. 18 U.S.C. § 3161(c) (1); 18 U.S.C. § 3161(h) (1) (F); 18 U.S.C. § 3161(h) (3) (A); 18 U.S.C. § 3161(h) (8) (A), (B); *United States v. Jodoin*, 672 F.2d 232 (1st Cir. 1982). Therefore, primarily at issue is whether the interval between June 3, 1982, and September 15, 1982 (the date the instant motion was filed) is also subject to any of the Act's excludable provisions. Defendant contends and the Court concurs that the focus of this examination revolves around 18 U.S.C. § 3161(h) (1) (F) and (J).

Five defense motions were pending during this critical three and one-half month period. (In actuality seven defense motions were pending inasmuch as the March 15, 1982 In Camera Disclosure/Discovery/Ex Parte Evidence Motion embodied three distinct motions). Most notable among these unresolved Motions was Defendant's Motion to Dismiss, wherein Defendant alleged his indictment was returned by a grand jury impaneled under procedures that failed to comport with constitutional and statutory requirements. An extensive brief and numerous exhibits accompanied this particularly substantial Motion to Dismiss. SCHMIDT submitted a supplemental brief and exhibits following the Government's Response. The Motion, Supporting Brief, attached Exhibits, Government's Response and Defendant's Supplemental Reply plus Exhibits consisted of 119 pages and of this total of 119 pages, 109 pages were filed in behalf of the Defendant. Moreover, Defendant's Motion evoked a flurry of corresponding assaults on this District's grand jury selection process in comparable Motions to Dismiss filed by 14 other Defendants indicted by the same grand jury in related

state highway contract cases assigned to the docket of this Court.

Consequently, a meritorious motion would entail dismissing SCHMIDT's indictment, fourteen additional Defendants' indictments, and would jeopardize the status of all other indictments returned by this and similarly selected grand juries in the Western District of Texas. SCHMIDT's Grand Jury Motion demanded more than perfunctory judicial review; indeed it necessarily compelled intricate scrutiny and research of unusually complex legal, factual and statistical issues.

The Court concluded, after examining this Motion to Dismiss the Indictment, plus the supporting briefs and exhibits, as well as the Government's Response, that proper disposition of the Grand Jury Motion necessitated oral argument. Moreover, defense counsel contacted Court personnel and specifically requested that the Court conduct an evidentiary hearing on SCHMIDT's Grand Jury Motion. The Court further determined that the ends of justice would be served best by simultaneously scheduling the hearing on the corresponding Grand Jury Motions filed in behalf of the fourteen Defendants who were indicted for related offenses. Coordination of these hearings for September 24, 1982, enabled the Court to conduct ongoing critical research pertaining to SCHMIDT's Motion plus the companion motions of related Defendants and to undertake needed preparation for the evidentiary hearing on these motions. Moreover, this coordinated approach was clearly compatible with the apparent strategies of counsel for SCHMIDT and the related state highway contractor defendants, inasmuch as SCHMIDT's attorneys were the sole defense counsel who conducted the hearing on the Grand Jury Motions, and the arguments they waged, the evidence they submitted, as well as the testimony they elicited were formally adopted in their entirety by all other nonparticipating defense lawyers.

Furthermore, Defendant cannot correctly argue that his Grand Jury Motion was fully developed and ripe for Court resolution prior to the September 24, 1982 hearing. Sig-

nificantly, at this September 24th hearing, Defendant called two witnesses to testify and introduced twelve exhibits *in addition to* the seventeen that were attached to his Grand Jury Motion and Supplemental Reply. Comprising over three hundred and ten pages (including perforated computer printout attachments), these twelve exhibits constituted substantive evidentiary matter not made available to the Court for consideration in connection with its ruling on SCHMIDT's Grand Jury Motion until September 24, 1982. In addition, two key defense exhibits (Defendant's Exhibit L and Defendant's Exhibit P) reflect that they were obtained from the Secretary of State within two days of the hearing, and Defendant's principal witness at the hearing, Dudley L. Poston, Jr., a demographer, testified that only during the preceding week had he been retained by the Defendant for the purpose of providing his expertise in conjunction with SCHMIDT's Motion. Clearly, in view of the massive amount of additional documentary evidence introduced at the September 24th hearing coupled with the presentation of testimony from two called witnesses, Defendant cannot properly contend that his Grand Jury Motion could have been adequately considered and fully decided in advance of this hearing.

Because of the incomplete development of the evidence germane to the Court's consideration of SCHMIDT's Grand Jury Motion, it was not "actually under advisement by the Court" prior to the September 24, 1982 hearing. 18 U.S.C. § 3161(h)(1)(J). A Motion is not under advisement for Speedy Trial Act purposes pending hearing, when as in the instant case, the Motion, Response and Briefs submitted appear insufficient and premature for the Court to rule thereon, and an evidentiary hearing is requested by the Movant and/or deemed necessary by the Court. 18 U.S.C. § 3161(h)(1)(F),(J). Moreover, the considerable weight of Defendant's Grand Jury Motion, supporting briefs and accompanying exhibits, the attendant research required to evaluate preliminarily the Motion's validity, the Motion's monumental implications in this case as well as many other criminal proceedings, and the correlation between

SCHMIDT's Grand Jury Motion with parallel motions filed in behalf of fourteen other Defendants on this Court's Docket combine to substantiate that it was reasonably necessary for this Court to postpone scheduling the evidentiary hearing on the Grand Jury Motion until September 24, 1982. The period of delay from the filing of SCHMIDT's Grand Jury Motion through the conclusion of the hearing on it results directly from the Court's preliminary consideration of the Motion, Exhibits and Briefs as well as the Court's initiation of essential research dictated by this Motion.[1] 18 U.S.C. § 316(h)(1)(F). The manner in which this Court resolved Defendant's pretrial motions is fully consistent with the provisions of the Speedy Trial Act, 18 U.S.C. § 3161, *et. seq.* See generally, *United States v. Brim*, 630 F.2d 1307 (8th Cir. 1980), *cert. denied*, 452 U.S. 966 (1981); *United States v. Molt*, 631 F.2d 258 (3rd Cir. 1980); *United States v. Regilio*, 669 F.2d 1171-1173; *United States v. Jodoin*, 672 F.2d at 236-239. The Court expressly finds that Defendant's rights under the Speedy Trial Act. 18 U.S.C. § 3161, *et. seq.*, have not been violated.[2]

Therefore, pursuant to 18 U.S.C. § 3161(h), the Court finds that the ends of justice served by its continuing the May 10, 1982 pretrial motions hearing and the June 2, 1982 trial setting to September 24, 1982 and October 18, 1982 respectively outweigh the best interests of the public and the Defendant in a speedy trial. The Court's basis for said finding, more fully articulated above, is that the significantly complex issues and voluminous supporting evidence attendant to Defendant's Motion to Dismiss the Indictment based on the grand jury impanelment procedures would make it unreasonable to expect adequate preparation for pretrial proceedings or for trial itself under the Court's previously imposed May 10, 1982/June 2, 1982 schedule.

IT IS THEREFORE ORDERED that pursuant to the provisions of 18 U.S.C. § 3161(h)(8)(A) and (B), the period of time from May 10, 1982, through September 24, 1982 shall be excludable in computing the time within which the trial of this cause must commence.

III. SIXTH AMENDMENT SPEEDY TRIAL RIGHTS

Defendant SCHMIDT additionally attacks the duration of time that elapsed between the date of his indictment and commencement of his trial on the ground that his Sixth Amendment right to a speedy trial has been violated. In assessing the merits of this constitutional attack, the Court must consider four specific factors, i.e. (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant has asserted his right to a speedy trial; and (4) whether the defendant suffered any prejudice from the delay. *Barker v. Wingo*, 407 U.S. 514 (1972). No single consideration is "either a necessary or sufficient condition to the finding of the deprivation of the right of speedy trial . . . they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533.

A. *Duration of Delay*

A lengthy delay is a prerequisite to undertaking the constitutional inquiry as above-outlined. The duration of delay is measured from the date of a triggering event (here the return of the indictment) to the commencement of trial. The delay from the triggering event to trial must be "presumptively prejudicial;" otherwise, "there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530.

Although the United States Court of Appeals for the Fifth Circuit has concluded that a fifteen month delay between the triggering event and trial is presumptively prejudicial to the Defendant, *United States v. Avalos*, 541 F.2d 1100 (5th Cir. 1976), this appellate court has also determined that a ten and one-half month delay is *not* considered presumptively prejudicial. *United States v. Maizumi*, 526 F.2d 848 (5th Cir. 1976). In the case at bar, less than eleven months elapsed between SCHMIDT's indictment and jury selection. This 10 and 9/10ths month period is less than fourteen days beyond the delay present in *Maizumi* which

was not viewed as presumptively prejudicial. The Court is of the opinion that the delay herein, fractionally exceeding the ten and one-half months sanctioned in *Maizumi*, fails to constitute a presumptively prejudicial delay. Because of Defendant's inability to sustain the requisite burden with respect to this threshold issue, consideration of the three remaining factors is unwarranted. Even assuming however, that SCHMIDT's trial delay was presumptively prejudicial, the Court, for reasons articulated below, is of the opinion that Defendant would remain unable to demonstrate that the post-indictment chronology herein violated his Sixth Amendment protection.

B. *Reason for Delay*

Justifiable reasons permit an appropriate delay of a trial. *Barker v. Wingo*, 407 U.S. at 531. All delays from December, 1981, through mid-March, 1982, were directly attributable to defense motions, including motions for extensions of time to file additional pretrial motions. The late March, 1982, to early June, 1982, trial delay evolved substantially because of the unavailability of an essential government witness, and the June, 1982 through October, 1982 period is addressed in the Speedy Trial Act discussion, *supra*. The Court is of the view that the reasons for such delays were fully justified by the circumstances. *Id.*, *Isaac v. Perrin*, 659 F.2d 279 (1st Cir. 1981); *United States v. Aguero*, 534 F.Supp. 486 (N.D.Cal. 1982).

C. *Defendant's Assertion of Right*

Prior to the filing of the instant Motion, Defendant did not affirmatively and consistently assert his speedy trial rights. Defendant requested and received two extensions of time to file additional motions. After the deadline imposed in the latest extension, Defendant filed more pretrial motions, including a March, 1982 motion to file additional motions. In September, 1982 SCHMIDT filed three more motions. Defendant's ongoing filing of pretrial motions had the ultimate effect of delaying his trial date. The conduct of De-

fendant herein is ostensibly inconsistent with one who was zealously urging an immediate commencement of his trial. Significantly, throughout the pretrial period Defendant never requested a specific trial setting or expressed a desire for a trial date earlier than that scheduled by the Court.

D. *Prejudice*

Pursuant to *Barker*, prejudice, the fourth consideration that the Court must examine in its present inquiry, should be analyzed in terms of the protective interests underlying Defendants' speedy trial rights, i.e., preventing oppressive pretrial incarceration; minimizing Defendant's anxiety and concern; and limiting the possibility that the defense will be impaired. *Barker v. Wingo*, 407 U.S. at 532. Absent a sufficient showing of prejudice, Defendant's constitutional speedy trial right is not violated. See *United States v. Greer*, 655 F.2d 51 (5th Cir. 1981). For reasons below set forth, the Court finds that Defendant has failed to substantiate that he was prejudiced from his purportedly delayed trial under the standard enunciated in *Barker* and applied in its progeny.

Prior to trial, Defendant SCHMIDT was never incarcerated for the offenses charged in the instant indictment. SCHMIDT remained free on his personal recognizance, waived personal appearance at his arraignment and avoided undergoing routine criminal processing by the United States Marshal. The Court inescapably concludes that SCHMIDT has not been the victim of oppressive pretrial incarceration. Moreover, SCHMIDT's pretrial freedom, which afforded him the opportunity to remain at his home with his family and to continue employment with his corporation, Cooper & Woodruff Construction Company, Inc., would doubtlessly have the effect of minimizing the Defendant's anxiety and concern. Outside of allegations of adverse pretrial publicity, wholly unsupported with evidence, Defendant has failed to submit proof of or even allude to any anxiety or concern that he suffered because of a delayed trial commencement.

SCHMIDT is further unable to argue persuasively this his October 18, 1982 trial setting hampered the preparation or presentation of his defense. This contention is unfounded inasmuch as the record reflects that the major witness and significant exhibits in support of SCHMIDT's Grand Jury Motion were obtained in mid-September, 1982, to late September, 1982. Also approximately one month before trial, Defendant filed additional pretrial Motions, including the instant Motion, a Motion to Strike Surplusage from the Indictment and another Motion to Dismiss the Indictment. It is apparent from the record and this sequence of events, that counsel for the Defendant availed themselves of the imposed schedule to garner more evidence, perform additional research, and to engage in increased preparation in behalf of their client. Clearly, any delay of Defendant's trial did not operate to impair SCHMIDT's defense, but rather was used to the Defendant's advantage.

For the foregoing reasons, the Court expressly finds the Defendant's Sixth Amendment right to a speedy trial has not been violated. *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Greer*, 655 F.2d 51 (5th Cir. 1981).

SIGNED and ENTERED this 22nd day of November, 1982.

JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

[1]The Court has placed primary emphasis herein on its consideration of Defendant's Grand Jury Motion. It was also necessary however, for the Court during the subject interval to review and perform pertinent research on the above-noted discovery based motions filed in late March, 1982, by the Defendant. An 81 day delay in the disposition of five comparatively routine discovery motions has been held to comply with the requirements of the Speedy Trial Act. *United States v. Regilio*, 669 F.2d 1169 (7th Cir. 1981), *Cert. denied*, ——U.S.——, 102 S.Ct. 2959 (1982).

[2]Pursuant to the chronology hereinabove specified, the Court finds that Defendant's trial commenced after only 16 days of non-excludable time and elapsed, i.e. December 10, 1981 - December 16, 1981, and October 9, 1982 - October 17, 1982.

§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d) (1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense

or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to —

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge

granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so un-

usual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8) (A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly —

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having cus-

tody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

§ 3162. Sanctions

(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161 (b) as extended by section 3161 (h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the limit required by section 3161 (c) as extended by section 3161 (h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161 (h) (3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among

others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

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FILED
DEC 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-618

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES H. SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether a four-month postponement of an evidentiary hearing on a complex motion challenging grand jury selection procedures was excludable in determining whether petitioner's trial began within the time limit fixed by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

2. Whether the procedures employed in selecting the grand jury that indicted petitioner comported with the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-618

CHARLES H. SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 711 F.2d 595. The district court's order denying petitioner's motion to dismiss the indictment resting on the Speedy Trial Act (Pet. App. C1-C15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1983. A petition for rehearing was denied on September 9, 1983. The petition for a writ of certiorari was filed on October 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of making false statements before the grand

jury, in violation of 18 U.S.C. 1623. Petitioner was sentenced to a three-year term of imprisonment and fined $10,000.

1. On November 20, 1981, a federal grand jury in the Western District of Texas indicted petitioner on two counts of making false declarations before a grand jury in violation of 18 U.S.C. 1623. The indictment charged that, during a grand jury investigation of bidrigging on government contracts, petitioner had falsely testified that neither he nor anyone in his construction and paving company had been asked to let another company win a bid through collusion (Count I), and that he had falsely stated that neither he nor his associates had asked other contractors to allow them to win a bid (Count II) (C.A. Record Excerpts 3-5). Petitioner was arraigned on December 9, 1981 (Pet. App. A10).

Prior to trial, petitioner filed numerous pretrial motions including, on March 15, 1982, a motion to dismiss the indictment alleging that the procedure employed in selecting the grand jury that had indicted him violated the local juror selection plan and was in substantial violation of the Jury Selection and Service Act of 1968, 28 U.S.C. (& Supp. V) 1861 *et seq.* (see Pet. App. C2-C4). Under the then-applicable provisions of the jury selection plan for the Western District of Texas, a grand jury could be drawn from the separate lists of qualified jurors maintained for two or more of the divisions of the court "on a substantially proportionate basis" (Pet. App. A7). The grand jury that had indicted petitioner was drawn at random from a pool of 60 jurors — 30 each from the juror wheels of the Waco and Austin Divisions of the court. Petitioner complained in his motion that because registered voters in the Austin Division are more numerous than those in the Waco Division, the pool was improperly constituted.

The district court initially scheduled an evidentiary hearing on this and other motions on May 10, 1982, but later postponed the hearing until September 24, 1982. Shortly before the September 24 hearing date, petitioner filed a motion to dismiss the indictment alleging that his trial had not commenced within the period provided by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

At the conclusion of the September 24 evidentiary hearing, the district court found that the grand jury selection procedures did not violate the local jury selection plan or the Jury Selection and Service Act (Pet. App. A9, C4; C.A. Record Excerpts 12-16). Subsequently, the district court denied the Speedy Trial Act motion. The court concluded that the period of time between the filing of petitioner's motion attacking the composition of the grand jury and the filing of his speedy trial motion was excludable time under the Speedy Trial Act, 18 U.S.C. 3161(h)(1)(F), because the delay resulted from the pendency of the former motion. In addition, invoking 18 U.S.C. 3161(h)(8), the district court found that postponement of the evidentiary hearing date from May 10, 1982, served the ends of justice and that the considerations justifying the continuance "outweigh[ed] the best interests of the public and the Defendant in a speedy trial" (Pet. App. C10).

The government's evidence at trial, the sufficiency of which petitioner does not challenge in this Court, established that, contrary to his grand jury testimony, petitioner had agreed on numerous occasions to submit intentionally high bids to enable other contractors to win jobs.[1] Moreover, following his grand jury testimony, petitioner told

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[1]Three of petitioner's co-conspirators testified that they had asked him or his superior to submit rigged bids, had received petitioner's agreement to submit a complementary bid, and had informed petitioner as to how they would bid (see, *e.g.*, 9 R. 278-290, 292-309).

another individual who had just received a grand jury subpoena that he had denied any knowledge of bidrigging during his grand jury testimony; petitioner suggested that the other witness do likewise. 10 R. 521-522. Indeed, petitioner later told the same witness that everyone was "just going to continue to deny" any knowledge of bidrigging and that "the lawyers can tear up" witnesses that had admitted involvement in bidrigging. GX 28, 29, 37. On the basis of this evidence, the jury returned a verdict of guilty on Count I of the indictment.[2]

2. The court of appeals affirmed petitioner's conviction. The court found "little merit" to petitioner's attack on the grand jury selection procedures (Pet. App. A7). The court observed that the Jury Selection and Service Act provides for dismissal of an indictment only where there has been a substantial failure to comply with the Act (Pet. App. A8). See 28 U.S.C. 1867(a). The court also noted that petitioner had not contended that a provision of the Act had been violated, but alleged only a violation of the local jury selection plan (Pet. App. A8). The court of appeals held that even if the selection method employed here violated the local plan, it did not rise to the level of a substantial violation of the Act because there was "no doubt that the random selection of jurors which the Act seeks to enforce was not violated in this case" (*ibid.*).

The court of appeals expressed doubt, moreover, that the local plan had in fact been violated in this case, noting that the plan required only substantial proportionality, not exact proportionality, of representation of different divisions (Pet. App. A9). The court also noted two ironies in connection with petitioner's motion attacking the grand

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[2]The jury was unable to reach an unanimous verdict on Count II. The district court granted petitioner's motion for a mistrial with respect to that count. 13 R. 992.

jury's composition. First, by the time that motion had been filed, the local jury selection plan had been amended to abolish multidivision grand juries and to permit a grand jury drawn from one division of the district to consider matters that would be triable in an adjacent division. Thus, had his indictment been dismissed, petitioner could lawfully have been reindicted by a grand jury drawn entirely from the division he contends was overrepresented here. Second, the court of appeals observed that, as it happened, the grand jury actually drawn from the challenged pool that had indicted Schmidt was composed of approximately the "correct" proportion of persons from the two divisions. Pet. App. A9.

The court of appeals also upheld denial of petitioner's Speedy Trial Act motion (Pet. App. A9-A12). The determinative issue, the court recognized (Pet. App. A10), was whether the 128 days between the date initially set for the evidentiary hearing on petitioner's grand jury motion and the date on which his Speedy Trial Act motion was filed was excludable in determining whether petitioner's trial began within the period allowed by the Act.[3] The court noted that Section 3161(h)(1)(F) of the Act excludes from speedy trial reckoning any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion" (Pet. App. A11). Relying upon its decision in *United States* v. *Horton*, 705 F.2d 1414 (5th Cir. 1983), cert. denied, No. 83-5259 (Nov. 28, 1983), the court rejected petitioner's contention that any delay longer than 30 days in disposing of a motion requiring a hearing is not excludable under Section 3161(h)(1)(F).

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[3]Filing of the Speedy Trial Act motion, prior to the date on which the grand jury motion ultimately was heard (see page 3, *supra*), halted running of the speedy trial "clock". 18 U.S.C. 3161 (h)(1)(F).

In *Horton*, 705 F.2d at 1416, the court had held that unless the delay entailed is egregious — as when a hearing is delayed without cause in the face of repeated requests for a hearing date or where the hearing delay reflects an intent to evade the requirements of the Speedy Trial Act — the entire period from the filing of a pretrial motion requiring a hearing until conclusion of the hearing is excludable under Section 3161(h)(1)(F). The court of appeals found no egregious delay in this case, observing that petitioner had not sought an earlier hearing, and found no evidence of an intent to evade the requirements of the Speedy Trial Act (Pet. App. A11-A12). Rather, the court of appeals concluded, the delay was attributable to the nature of the issues presented by the pending motion (*id.* at A12):

> Faced with what the [district] court perceived to be a complex and potentially far-reaching decision, the court postponed the original hearing to develop more fully the substance of the claim presented to it.

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the time that elapsed following postponement of the hearing upon his motion to dismiss the indictment originally scheduled for May 10, 1982, is not excludable from speedy trial computations. Alternatively, petitioner contends (Pet. 11-13) that the decision below conflicts with the Second Circuit's decision in *United States* v. *Cobb*, 697 F.2d 38 (1982), which imposes a reasonableness limitation upon the Section 3161(h)(1)(F) exclusion. As we explained in our brief in opposition in *Horton*, in which the Court has just recently declined to review a claim indistinguishable from the present one (see page 5, *supra*), these contentions are incorrect. A like disposition of petitioner's claim is appropriate.

a. Petitioner observes that the Speedy Trial Act was intended by Congress to "put teeth into the speedy trial guarantee" of the Sixth Amendment (Pet. 9, quoting *United States* v. *Mehrmanesh*, 652 F.2d 766, 769 (9th Cir. 1980)). But while Congress wanted to establish time limits to govern the prosecution of criminal cases, it also wanted to avoid "assembly-line justice" that sacrificed due process for the sake of dispatch. H.R. Rep. 93-1508, 93d Cong., 2d Sess. 15 (1974). The Act accordingly lists numerous categories of "delay" that must be excluded in determining whether a defendant's trial began within the time permitted by the Act. 18 U.S.C. 3161(h).

Among the automatic exclusions is 18 U.S.C. 3161(h)(1)(F) which provides for exclusion of:

> delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion * * *.

The plain language of the statute indicates that the exclusion begins when a pretrial motion is filed and ends when the motion is heard. *United States* v. *Stafford*, 697 F.2d 1368, 1373 (11th Cir. 1983). On its face, the language, "or other prompt disposition of [] such motion," which petitioner invokes to limit the exclusion (Pet. 8), does not govern the length of the exclusion where the motion is decided following a hearing. Instead, as the Senate Report on the 1979 Amendments to the Act explains, that language defines the ending date of the exclusion for motions that are decided on the papers without the benefit of a hearing (S. Rep. 96-212, 96th Cong., 1st Sess. 34 (1979)):

> Finally, the section provides exclusion of time from filing to the conclusion of hearings on or "other prompt disposition" of any motion. This later

> language is intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing.

Accord, Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, As Amended* 33 (rev. 1979, with amendments Aug. 1981) [hereinafter cited as *Judicial Conference Guidelines*].[4]

Congress was well aware that, if abused, Section 3161(h)(1)(F) "could become a loophole which could undermine the whole Act." S. Rep. 96-212, *supra*, at 34. But rather than limiting the excludable time available for motions subject to hearing (as it did with respect to motions to be decided on the papers), Congress chose to admonish the courts to develop "basic standards for prompt consideration of pretrial motions." *Ibid.* Toward this end Congress encouraged use of circuit guidelines authorized under Section 3166(f); guidelines were to include "uniform standards for motion practice." *Ibid.*[5]

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[4]Petitioner's reliance (Pet. 10) upon the 30-day "under advisement" exclusion established by Section 3161(h)(1)(J) is unavailing. A motion that requires a hearing such as petitioner's motion to dismiss the indictment — upon which petitioner sought and was granted an evidentiary hearing — plainly is not under advisement prior to the time the hearing is held. Petitioner's suggestion (Pet. 10 n.2) that the district court must have studied the issues during the interval prior to the hearing is irrelevant. It is perfectly clear that the district court did exactly that (see Pet. App. C9-C10); yet the motion was not taken under advisement until the court had before it all of the pleadings and evidence it needed to render its decision. See *United States* v. *Bufalino*, 683 F.2d 639, 644 (2d Cir. 1982), cert. denied, No. 82-596 (Jan. 10, 1983) (quoting *Judicial Conference Guidelines* 42).

[5]Thus, the statement in the Senate Report emphasized by petitioner (Pet. 9) indicating that "the Committee [does not] intend that additional time be made eligible for exclusion by postponing the hearing date * * * beyond what is reasonably necessary" (S. Rep. 96-212, *supra*, at 34) does not reflect a determination that time prior to a hearing should be

b. Petitioners contend that certiorari should be granted here to resolve an apparent conflict between the Fifth Circuit's decisions in *Horton* and in this case and the Second Circuit's decision in *United States* v. *Cobb*, 697 F.2d 38, 43-46 (1982), which limits the Section 3161(h)(1)(F) exclusion for pendency of a pretrial motion to the time reasonably necessary for processing the motion, even in cases where the motion is to be heard. See also *United States* v. *Novak*, 715 F.2d 810, 819-820 (3d Cir. 1983), petitions for cert. pending *sub nom. Ware* v. *United States*, No. 83-5560, *McGuire* v. *United States*, No. 83-5613, and *Arabia* v. *United States*, No. 83-5650;[6] compare *United States* v. *Stafford, supra.*[7] But the court below did not adopt an absolute rule excluding all time elapsed prior to a hearing date. Rather, as in *Horton*, the court indicated that some portion of the pendency period might be disregarded in circumstances where delay was "egregious" (Pet. App. A11-A12; 705 F.2d at 1416). Accordingly, no clear conflict of

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excludable only if reasonably necessary, but instead Congress's determination that promptness in hearing practice itself should be assured through circuit guidelines. Otherwise, this statement would be inconsistent with the statements immediately preceding it, which we have quoted in the text, that such regulation of motion practice was essential to prevent Section 3161(h)(1)(F) from becoming a loophole in the Act. In any event, denial of the speedy trial motion in this case is entirely consistent with a standard of "reasonable necessity." See page 10, *infra*.

[6]In *Novak*, the Third Circuit adopted the approach of the Second Circuit's *Cobb* decision.

[7]In *Stafford*, the Eleventh Circuit stated that Section 3161(h)(1)(F) does not condition exclusion upon a determination that a hearing was promptly held (697 F.2d at 1373). It did not address the question whether pretrial motion-related delay is non-excludable where it is shown that a hearing was delayed with intent to evade the sanctions of the Act.

authority exists between the Fifth Circuit and decisions of any other court of appeals.[8]

Moreover, there is no reason to believe that petitioner would have prevailed upon his claim in either the Second or Third Circuits, for the district court's findings clearly disclose that the postponement of the hearing on petitioner's motion was reasonably necessary to the proper determination of the issues. The court noted that numerous defense motions were pending contemporaneously during the interval in question (Pet. App. C7). In explaining the postponement, the district court stressed the voluminous pleadings and exhibits it was required to consider in connection with petitioner's motion, and most importantly, the fact that petitioner's motion "evoked a flurry of corresponding assaults on this District's grand jury selection process in comparable Motions to Dismiss filed by 14 other Defendants indicted by the same grand jury" in related cases assigned to the same district judge (*ibid.*). Because defense counsel sought an evidentiary hearing in this case and the comparable cases, and because the court determined that the ends of justice would best be served by scheduling a single hearing on all 15 motions,[9] the court reasonably determined that additional time was necessary for it to prepare for the omnibus hearing (Pet. App. C8).[10]

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[8]Petitioner's reliance (Pet. 12) upon *United States* v. *Raineri*, 670 F.2d 702, 708 (7th Cir. 1982), is entirely misplaced. The Seventh Circuit there addressed the situation in which pretrial motions are to be decided on the papers (see pages 7-8, *supra*). This is apparent because the court treated the motion as "under advisement" for Speedy Trial Act purposes beginning on the date the last pleading was filed. See page 8 note 4, *supra*.

[9]Petitioner's counsel presented evidence and argued for all 15 defendants at the evidentiary hearing (Pet. App. C8).

[10]Petitioner now claims for the first time that he "was * * * notified by the court's docket clerk that the settings were being rescheduled due to other matters which needed to be taken up by the court" (Pet. 3). We have found nothing in the record to support this assertion unless it is taken to refer to the related motions.

Indeed in *Cobb* the Second Circuit recognized that extensive time periods may be "reasonably necessary" for disposition of motions where they are numerous or complicated or where defendants' conduct contributes to the delay (697 F.2d at 45). Rather than dismiss the indictment in *Cobb*, the Second Circuit remanded to allow the district court to determine the reasonableness of the prehearing delay. Similarly, the Third Circuit emphasized in *Novak*, that the standard of "reasonable necess[it]y" it had adopted was a flexible one designed to accommodate the broad variety of circumstances that might warrant exclusion of extended periods of time under Section 3161(h)(1)(F). 715 F.2d at 820. And in *Novak* itself the Third Circuit concluded that the "number and complexity" of the pending motions warranted the hearing preparation delay (*id.* at 820-821).

Thus, this case provides no occasion for this Court to address whether prehearing delay excludable under Section 3161(h)(1)(F) is limited to "reasonably necessary" time. And the question whether a particular period of "delay" is reasonable is plainly so fact-bound as to be inappropriate for review by this Court.[11]

2. Petitioner also contends (Pet. 14-21) that a non-random method was used to select the grand jury that indicted him and that the court below followed an erroneous interpretation of the Jury Selection and Service Act in concluding that there was no substantial violation of that Act. This contention is unfounded.

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[11]We note that the court of appeals did not consider the district court's alternative holding that the postponement was necessary to serve the ends of justice (see page 3, *supra*). This alternative rationale is independently sufficient to sustain the judgment of the court of appeals.

The 23 grand jurors who indicted Schmidt were chosen at random from a panel of 60 qualified jurors — 30 each from the qualified juror wheels of the Austin and Waco Divisions of the Western District of Texas. The presence in the pool of 30 rather than 39 potential jurors from the Austin Division did not violate either the local plan or the Act. As the court of appeals noted, the local plan did not require the two divisions to be represented in the jury pool on an exactly proportionate basis. Rather, substantial proportionality was all that was required under the former local plan. As both courts below correctly held, the substantial proportionality requirement was satisfied by the use of an equal number of jurors from both divisions. Pet. App. A9.

But even assuming that the selection method violated the local plan, there was no basis here for dismissal of the indictment. Dismissal of an indictment is required only where there has been a substantial violation of the Act. 28 U.S.C. 1867(a). Courts thus must apply the harmless error doctrine even as to direct violations of the Act. *United States* v. *Bearden*, 659 F.2d 590, 600 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982). Petitioner has cited no authority establishing that technical violations of the Act that do not interfere with the random selection of jurors or result in the disqualification of jurors on the basis of non-objective criteria are to be treated as substantial violations of the Act. Rather petitioner's contention appears to be that the lower courts have universally misinterpreted the Jury Selection and Service Act (see Pet. 14).

In this case, the court of appeals concluded that the alleged violation of the former local plan had not interfered with the random selection of grand jurors and had not otherwise frustrated the objectives of the Act. It is difficult to see how any other conclusion could be reached. The Act prescribes that jurors be chosen "at random from a fair

cross section of the community in the district or division wherein the court convenes." 28 U.S.C. 1861. Petitioner has not suggested that the Act required either the multidivisional grand jury system formerly employed in the Western District of Texas, or the single division approach now employed (see page 5, *supra*). Thus, it would be wholly arbitrary to condemn the procedure employed in this case because of the particular ratio of grand jurors chosen from the Waco and Austin Divisions.[12] And there is no suggestion here that the selection process by which the grand jury was chosen from among the panel of 60 qualified individuals was other than completely random. Thus, there was no substantial violation of the Act in this case.[13]

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[12]For this reason, petitioner's contention (Pet. 17 n.5) that the selection procedure used here "potentially discriminated against Hispanics" is insubstantial. In any event, Spanish-surnamed persons comprised 9% of the eligible voters in Austin, and 4% of the eligible voters in Waco. 5 R. 90. The impact of the jury selection plan violation alleged here (see page 2, *supra*) upon Hispanic participation on the grand jury is accordingly negligible. Simple computations reveal that the expected average incidence of Spanish surnamed grand jurors if the grand jury had been selected in the manner petitioner favors would be 1.69 per grand jury, whereas under the procedures used here, the expected incidence of Hispanic grand jurors would be 1.5.

[13]Petitioner contends that there is a conflict within the Fifth Circuit concerning the proper interpretation of the Act (Pet. 16-17). Conflicts within the Fifth Circuit, however, are for that court to resolve and do not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any event, *United States* v. *Kennedy*, 548 F.2d 608 (5th Cir.), cert. denied, 434 U.S. 865 (1977), which is said to be inconsistent with *Bearden*, and the decision here, may readily be reconciled with the subsequent decisions of that court. Indeed, in *Bearden* the Fifth Circuit explicitly distinguished *Kennedy*. 659 F. 2d at 603. *Kennedy*, the court explained, involved a juror selection practice that clearly resulted in the nonrandom selection of jurors. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

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CHARLES H. SCHMIDT,
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v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether trial delays caused by the trial court's cancellation and postponement of hearings on defense motions should be excluded in computing the time elapsed under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174?

2. Whether a non-random method of selecting grand jurors that potentially discriminates against a cognizable subgroup is a substantial violation of the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1871, as a matter of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App. A1-A12) below is reported at 711 F.2d 595. The district court's order denying petitioner's motion to dismiss the indictment based upon the Speedy Trial Act (Pet. App. C1-C15) is unreported.

JURISDICTION

The decision of the court of appeals was entered on July 22, 1983. A timely suggestion for rehearing en banc was denied by order of September 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Following indictment, Petitioner filed a number of pre-trial motions, including one attacking the grand jury selection process. The motion was filed on March 15, 1982 after Petitioner learned that the District Clerk had failed to select the grand jury from two divisions "on a substan-

tially proportionate basis" as required by the local rules thereby creating a non-random selection procedure.

As is more fully detailed in the Petition, the motion attacking the grand jury selection process and all other pending motions were fully briefed and ready for submission to the court on or before April 24, 1982. The trial court set a hearing on all pending motions for May 10, 1982 and ordered trial to commence on June 2, 1982. Without any formal communication the trial court vacated the trial and hearings settings. Finally, in late August 1982 a new trial date was set for October 18, 1982 and a date for hearing all pending motions was set for September 24, 1982.

Petitioner filed a motion to dismiss for violations of the Speedy Trial Act on September 15, 1982 some 144 days after all prior motions were fully briefed and ready for submission to the court. At the hearing on September 24, 1982, the trial court denied Petitioner's motion in connection with the selection of the grand jury. On October 8, 1982 the trial court denied Petitioner's Speedy Trial motion.

At trial, Petitioner was found guilty of one count of false swearing before a grand jury (18 U.S.C. §1623) but the jury was unable to reach a verdict on a second count under the same statute. Almost a month after trial, the trial court entered its Memorandum Opinion and Order (Pet.App.C1-C15) in connection with the denial of Petitioner's Speedy Trial motion.[1]

[1]The trial court characterized the delay as one caused by requests of Petitioner for an evidentiary hearing and as needed to deal with tag along motions in other cases (Pet.App. C-8). Petitioner, however, did not request an evidentiary hearing and there is no record indicating such. Counsel for Petitioner did request of the court's briefing clerk that Petitioner be notified if an evidentiary hearing was desired by the court. With respect to the motions in other cases, the parties in those cases filed papers virtually identical to the papers filed by Petitioner. All of the other motions were filed and ready for submission at the time of the first setting in May, 1982.

In its opinion, the court of appeals incorrectly recited that the evidentiary hearing had been "requested by defense counsel" (711 F2d 601, Pet.App. A-10) although this fact is unsupported by the record and is inaccurate. The appeals court also incorrectly concluded that Petitioner's counsel had appeared on behalf of the other parties at the hearing *(Id.)* even though a record was made of the fact that counsel for Petitioner was appearing only on behalf of Petitioner at that hearing. (Hearings Tr. Vol.5,pp.65,66).

In affirming, the court of appeals took the position that if the trial court held a hearing on a pending defense motion, the elapsed time from the date of filing until the hearing date was excluded for speedy trial purposes unless the defendant involved could demonstrate some intent to "evade the sanctions of the Act" or in some way demonstrate an "egregious case". (711 F.2d 601, 602, Pet.App. A-11) With respect to the grand jury selection issue, the court of appeals mischaracterized Petitioner's attack as being based only on violations of the local plan and not directed to the Jury Selection And Service Act. (711 F.2d 600, Pet.App.A-8)

ARGUMENT

Speedy Trial Claim.

The government first responds to the Petition herein by asserting that the claim is identical to that presented in *United States v. Horton*, 705 F.2d 1414 (5th Cir. 1983) cert. denied, No. 83-5359 (Nov. 28, 1983) and should be disposed of in a similar manner. Petitioner would be presumptuous in speculating on the reasons for the denial of certiorari in *Horton*. The government suggests, however, that the contention was that any delay in disposing of a motion for longer than 30 days is not excludable. (Gov. Res. p.5)

In the instant case, when Petitioner made his calculations of excludable time, all time consumed with briefing and preparing the motions for submission were excluded and no rigid 30 day limit was suggested. (Pet. p.4, 5) More significant, in the instant case the motions were not only fully briefed and ready for submission at an earlier date but a formal order setting them for hearing had been entered indicating that the motions were ripe for hearing.

The postponement of the hearing herein served no purpose other than to deprive Petitioner of a speedy trial. It would have been much more logical to have held an evidentiary hearing before commencing a study of the issues — yet, both the court of appeals (711 F.2d 601; Pet. App. A-12) and the government in its response (Gov. Res. p.8, n.4) make much of the trial court's stated purpose to delay the hearing to study the issues. Rather, a review of the trial settings in this case will demonstrate that motions hearings were set on all motions in relation to pending trial settings and when the trial date was postponed prior to the hearings date, the hearings were postponed to protect the later trial setting.[2]

There was no requirement for a hearing on any of Petitioner's motions. If the trial court had ultimately ruled without a hearing, it is clear than only 30 days could have been excluded after the motions were fully briefed and ready for submission. *United States v. Raineri*, 670 F.2d 702, 708 (7th Cir. 1982). Even if one assumes that a hearing was desirable and requested by a defendant, it should not follow that a trial court may then ignore the Speedy Trial Act merely by delaying such a hearing.

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[2]The first trial date was March 29, 1982 and pretrial hearings were held on March 3, 1982. The trial date was continued on motion of the government over objection of Petitioner. The June 2, 1982 trial date was vacated and at the same time, the hearings setting for May 10, 1982 was vacated.

Thus, at issue herein, is whether there should be any requirement for promptness in holding a hearing under 18 U.S.C. 3161(h)(1)(F). On this issue there is confusion among the circuits and a clear conflict has developed in the decided cases. In *United States v. Stafford*, 697 F.2d 1368 (11th Cir. 1983) the court held that the rule is different when "a pretrial motion requires a hearing" than when no hearing is required. *Id.* at 1373. When a hearing is "required", *Stafford* would hold that there is no "promptness" standard. Similarly, in the instant case and in *Horton, supra*, the 5th Circuit finds the exclusion of all time until a hearing is held on a pretrial motion to be "all but absolute." *Horton, supra* at 1416.

This standard for review is in clear conflict with that of the Second Circuit as set forth in *United States v. Cobb*, 697 F.2d 38 (2nd Cir. 1982) and the Third Circuit as indicated more recently in *United States v. Novak*, 715 F.2d 810 (3rd. Cir. 1983). Relying upon and quoting from *Cobb, supra* at 44, the court in *Novak* said at 820:

> [We] hold that under section 3161(h)(1)(F) of the Act permissable exclusions applicable to pretrial motions begin with the filing of a motion and run only "for a period of time that is 'reasonably necessary' to conclude a hearing [on the motion] or to complete the submission of the matter to the court for decision."

Contrary to the assertions of the government in its response, it is improper to assume under this standard that either the *Cobb* or *Novak* courts would have sanctioned a four month postponement of a hearing that required less than a day to conclude and had been originally scheduled after all parties had completed briefing of the motions. To hold otherwise defeats the statutory rights to a speedy trial because a trial court has only to hold a hearing on any

pretrial motion in order to exclude all time from the date of filing until the hearing. As sanctioned by the Fifth Circuit in the instant case, the trial courts may even postpone hearings to protect a postponement of a trial date from Speedy Trial scrutiny.

The clear conflict of treatment between the various circuits causes the Speedy Trial issue herein to be appropriate for a writ of certiorari. The trial court having formally set the motions for a prior hearing, thus indicating their ripeness for hearing, presents a refined issue herein and makes this case an ideal one for resolving such issue.

Grand Jury Selection.

The primary thrust of the government's response to the grand jury selection issue is to improperly characterize the original selection as one of "random" selection and to suggest that the only defect was in violating the terms of the local plan. While there was a clear violation of the local plan, Petitioner's attack on the selection process employed has always been that it resulted in a non-random selection which is contrary to the Jury Selection And Service Act, 28 U.S.C. 1861-1871.

When the district clerk drew an equal number of jurors from two different divisions that had significant differences in total population and racial composition, he insured not only a violation of the local plan requirement that jurors be drawn on a "substantially proportionate" basis but more importantly that there could not be a true random selection that would give each citizen in the pool an equal chance of being selected.

Using the voter registration lists as the basis for drawing is considered proper only so long as "any one whose name

appears on the voter lists has a chance of being selected equal to that of any other listed person. . . ." 1968 U.S. CODE CONG. & ADMIN. NEWS p. 1793. The failure to follow the local plan herein destroyed the randomness originally sought and sould be reviewed on writ of certiorari.

CONCLUSION

The questions presented herein are of a recurring and significant nature and review could greatly aid the lower courts in the application of the law with respect to such issues. A writ of certiorari should therefore be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that, on the 20th day of December, 1983, three copies of the foregoing Reply brief were served upon Respondent by placing same in the United States mail, postage prepaid, addressed to Respondent's attorneys as follows:

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